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No. (1)

Supreme Court, U.S.
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# Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

*Petitioners,*

—v.—

CHUBB INDEMNITY INSURANCE COMPANY, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In 1986, the U.S. Bankruptcy Court for the Southern District of New York (Lifland, J.) confirmed a landmark plan of reorganization for Johns-Manville Corporation that channeled hundreds of thousands of asbestos-related personal injury claims into a special trust fund for the benefit of injured workers and their families. The linchpin of this reorganization was the contribution by Petitioner and other insurers of hundreds of millions of dollars into a trust to settle disputed insurance liability and to assure payments for future asbestos claimants. In return for these payments, Travelers and the other insurers received protection in the form of an injunction that barred any future lawsuits with respect to these claims. As the Bankruptcy Court explained, this mechanism was intended to provide Petitioners with full and final protection from suits relating to, arising from or in connection with the Petitioners' insurance relationship with Johns-Manville. A final judgment confirming the Manville plan of reorganization, including the Manville injunction, was entered in 1988. The final judgment confirming the plan of reorganization explicitly provided that the extensive notice of the pendency of the confirmation hearing fully comported with the requirements of due process, a conclusion the Court of Appeals affirmed on direct appeal.

Last year this Court rejected a collateral attack by various claimants on the scope of the "Manville injunction," noting that the Manville injunction is part of the confirmation order that was incorporated in a final judgment rendered by

the Second Circuit in 1988 and, as such, may not be collaterally attacked. *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205–06 (2009) ("*Bailey*") (App. 70a).

This Court's prior decision arose from an attempt by certain asbestos claimants to evade the Manville injunction by suing Travelers directly in so-called "direct actions." The Bankruptcy Court, construing its own order, enforced the injunction, and the District Court affirmed that order. In 2008, however, the Second Circuit reversed, holding that the Bankruptcy Court lacked subject matter jurisdiction in 1986 to enter a confirmation order that extended beyond the "res" of the debtor's estate.

This Court reversed the Second Circuit's 2008 ruling, and specifically held that the Court of Appeals erred in revisiting the subject matter jurisdiction of the Bankruptcy Court more than two decades after the Johns-Manville plan of reorganization was confirmed in a final, non-appealable judgment.

This Court remanded the case with instructions to the Court of Appeals to address the objection of one insurance company that the insurer lacked constitutionally adequate notice of the Bankruptcy Court's 1986 injunction. Significantly, this issue, which was not addressed by the 2008 Second Circuit panel because it had erroneously found that the Bankruptcy Court lacked subject matter jurisdiction to enter the Manville injunction, had been resolved by the Second Circuit on direct appeal in 1988. Faced with a narrow issue on remand that had previously been resolved by the Second Circuit, the

two remaining judges from the 2008 panel of the Second Circuit issued a 64-page *per curiam* slip opinion reinstituting its prior ruling that the Bankruptcy Court lacked subject matter jurisdiction in 1986 to issue the injunctions contained in the long-final Manville confirmation order—*i.e.*, the very question this Court in *Bailey* ruled should not have been reexamined by the Court of Appeals. The questions presented, therefore, are:

(1) Whether the Court of Appeals violated this Court's mandate by reinstating the precise jurisdictional ruling that this Court reversed in *Bailey*, in express contravention of this Court's ruling that it was error for the Court of Appeals to entertain a collateral attack on the Bankruptcy Court's subject matter jurisdiction two decades after the Bankruptcy Court's confirmation became final.

(2) Whether the Court of Appeals erred in ruling, as a matter of constitutional due process, that publication notice was insufficient to bind a future contingent claimant to a final bankruptcy court order where: (i) the notice procedure was approved by the Bankruptcy Court and affirmed on direct appeal over two decades ago as adequate to put all interested parties on notice consistent with the requirements of due process; (ii) the extensive publication notice comported with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313–19 (1950) and its progeny, which has been settled law for over 60 years and clearly establishes that reasonable publication notice is constitutionally adequate to bind future and conjectural claimants in the bankruptcy context; and (iii) actual notice to each individual

was not required to bind non-parties such as respondent given that a non-party may be bound by a judgment "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy" proceedings, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

## PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this case are The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp.

In addition to Petitioners, other appellees below were Common Law Settlement Counsel, Statutory Settlement Counsel, and Hawaii Settlement Counsel.

The Respondents in this case (appellants below) are Chubb Indemnity Insurance Company, Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony, Asbestos Personal Injury Plaintiffs, and Cascino Asbestos Claimants.

The Debtors in the Chapter 11 proceedings from which this petition arises are Johns-Manville Corporation, Manville Corporation, Manville International Corporation, Manville Export Corporation, Johns-Manville International Corporation, Manville Sales Corporation (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation, and Manville Service Corporation), Manville International Canada, Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl Ranch Corporation, Johns-Manville Idaho, Inc., Manville Canada Service, Inc., and Sunbelt Contractors, Inc.

## RULE 29.6 DISCLOSURE

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of The Travelers Indemnity Company.

Travelers Casualty and Surety Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Casualty and Surety Company.

Travelers Property Casualty Corp. is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Property Casualty Corp.

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In the Supreme Court of the United States

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THE TRAVELERS INDEMNITY CO., ET AL.,

*Petitioners,*

v.

CHUBB INDEMNITY INSURANCE CO., ET AL.,

*Respondents.*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The Travelers Indemnity Company, Travelers Casualty and Surety Company, and Travelers Property Casualty Corp. (collectively, "Travelers" or "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The Second Circuit's March 22, 2010 opinion on remand from this Court (App. 1a) is reported at 600 F.3d 135. This Court's June 18, 2009 opinion reversing and remanding to the Court of Appeals (App. 54a) is reported at 129 S. Ct. 2195. The original February 15, 2008 opinion of the Court

of Appeals (App. 90a) is reported at 517 F.3d 52. The district court's March 28, 2006 opinion (App. 126a) is reported at 340 B.R. 49. The Bankruptcy Court's August 17, 2004 order (App. 175a) and findings of fact and conclusions of law (App. 190a) are not officially reported, but are available at 2004 WL 1876046 and 2004 Bankr. Lexis 2519.

The Bankruptcy Court's original 1986 insurance settlement order (App. 386a) and confirmation order (App. 350a) are unreported but were immediately preceded by an opinion (App. 299a) reported at 68 B.R. 618. The Bankruptcy Court's August 2, 1984 order (App. 546a) is unreported. The district court's 1987 opinion affirming the original insurance settlement order and confirmation order on direct appeal (App. 293a) is reported at 78 B.R. 407. The Second Circuit's 1988 opinion on direct appeal affirming the original insurance settlement order and confirmation order (App. 277a) is reported at 837 F.2d 89.

## JURISDICTION

The Court of Appeals entered its judgment on March 22, 2010 (App. 1a), and denied a timely petition for rehearing and/or rehearing *en banc* on May 25, 2010 (App. 582a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 4 of the U.S. Constitution provides that "Congress shall have Power . . . To establish . . . uniform Laws on the

subject of Bankruptcies throughout the United States."

The due process clause of the Fifth Amendment of the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Section 524(g)(4)(A)(ii) of the Bankruptcy Code provides that in asbestos-related bankruptcies, "[n]otwithstanding the provisions of section 524(e)," a bankruptcy court may bar "any action directed against a third party who . . . is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party."

Section 524(h)(1) of the Bankruptcy Code provides, in pertinent part, that "if an injunction of the kind described in section (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered . . . to satisfy subsection (g)(4)(A)(ii) . . . ."

## STATEMENT OF THE CASE

This case presents several issues of vital importance to the administration of the Nation's bankruptcy laws, including the process relied upon by bankruptcy courts to provide notice of their orders and the binding effect of bankruptcy court orders to parties that are under constructive notice of such orders. Moreover, the case

raises fundamental issues regarding the supremacy of this Court in the federal judicial system.

This Court previously ruled in *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009) (App. 54a) ("*Bailey*"), that this appeal presents no occasion to reexamine the Bankruptcy Court's power in 1986 to order the injunctive relief that was the cornerstone of the Johns-Manville plan of reorganization. Recognizing that the Manville plan of reorganization had been affirmed in full on direct appeal more than two decades ago, this Court reversed an order of the Court of Appeals allowing a collateral attack on the Bankruptcy Court's subject matter jurisdiction to issue the Manville injunction. This Court explicitly held that "it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986." *Bailey*, 129 S. Ct. at 2205 (App. 70a); *see also id.* at 2203 (App. 66a) ("whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008"); *id.* at 2206 (App. 74a) (criticizing the panel's effort to reexamine the court's subject matter jurisdiction almost a quarter century after the injunction became a final order).

The Court remanded the case for the Court of Appeals to address the remaining few issues that were before the Court of Appeals that the court did not reach because of its erroneous holding that the Bankruptcy Court lacked subject matter jurisdiction to issue the Manville injunction. Specifically, the order remanding the case instructed the Court of Appeals to resolve the

contention of one insurance company, Chubb Indemnity Insurance Co. ("Chubb"), that Chubb lacked constitutionally adequate notice of the injunction and thus could not be bound by it. The order of the District Court affirming the Bankruptcy Court's dismissal of the Chubb notice issue should have been summarily affirmed given that the Second Circuit held on direct appeal in 1988 that the extensive publication notice preceding the approval of the Manville plan of reorganization was adequate to put all interested parties on notice and that such notice fully complied with due process. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (App. 292a) ("The notice . . . met the requirements of due process.").

Instead, on remand, a two-judge panel of the Court of Appeals impermissibly reinstated the precise jurisdictional ruling that this Court had reversed, categorically holding for the second time that the Manville Bankruptcy Court lacked subject matter jurisdiction to issue orders that extend beyond the res of the debtor's estate and allowing a collateral attack over twenty years after a final judgment had been issued. Ignoring the prior ruling by a different Second Circuit panel more than two decades earlier, the two-judge panel then concluded that, since the Bankruptcy Court purportedly had exceeded its subject matter jurisdiction, the notice preceding the confirmation of the Manville reorganization plan was insufficient to bind Chubb. In so doing, the Court of Appeals not only disregarded this Court's mandate and the prior decision by the Second Circuit on direct appeal, but also disregarded 60 years of case law upholding the con-

stitutionality of reasonable publication notice to bind future and contingent claimants in the bankruptcy context. Departing from numerous decisions by this Court and other courts of appeal, the Second Circuit improperly injected into the bankruptcy context inapplicable class action jurisprudence. As a result, the Court of Appeals' ruling calls into question the finality of confirmation orders that underlie the resolution of *hundreds of thousands of lawsuits and billions of dollars in trust funds held for the benefit of asbestos claimants.*[1] Under the reasoning of the Court of Appeals' decision, future and contingent claimants may now argue that they may never be bound by final, non-appealable orders confirming plans of reorganization, and reorganized debtors, bankruptcy trusts and settling parties will be vulnerable to endless collateral attacks.

This Court should grant certiorari to correct the Court of Appeals' blatant disregard of the mandate of this Court and to correct the numerous errors contained in the lower court's decision, which, if left to stand, would create enormous uncertainty as to the binding effect of innumerable final judgments, as well as the ability of bankruptcy courts to fashion remedies that advance the Bankruptcy Code's central policies favoring finality, settlement and reorganization of viable businesses. Particularly in these eco-

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[1] Such trusts, which were modeled on the orders in this case, have paid at least $10.9 billion to claimants as of 2008. *See* Lloyd Dixon, et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, 30 n.7 (RAND Corporation 2010) (hereinafter "RAND Report").

nomic times, imposing new and impossible notice requirements could have a profoundly adverse effect on the ability of bankruptcy courts to fashion reorganizations in a wide variety of settings. Specifically, the ruling below should be reversed by this Court for at least the following reasons.

***First***, by once again holding that the Bankruptcy Court lacked subject matter jurisdiction in 1986, two decades after the orders under review became final orders, the Court of Appeals exceeded its authority on remand, in violation of this Court's mandate.[2]

***Second***, in concluding that notice of the Bankruptcy Court's 1986 orders as respects Chubb was constitutionally deficient, the Court of Appeals impermissibly ignored the 1988 holding of the same court explicitly finding that the notice preceding the confirmation order fully complied with the requirements of due process. The 1988 final judgment was clearly correct because it is consistent with at least sixty years of case law holding that reasonable publication notice may bind future and contingent claimants such as Chubb, which seeks to preserve contribution claims against Travelers that are barred by the clear and unambiguous terms of the Manville injunction. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–19

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[2] Petitioners have filed a separate petition for a writ of mandamus in the event that this petition for writ of certiorari is denied. *See* Gressman & Gellar, *Supreme Court Practice* 655 (9th ed. 2007) (mandamus proper remedy to a party who has prevailed in the Supreme Court where the lower court does not proceed to execute the mandate or disobeys and mistakes its meaning).

(1950). The lower court ignored the *Mullane* standard, which has been upheld by this Court on numerous occasions, as recently as in the unanimous decision this year in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010). By ignoring *Mullane* and injecting inapplicable class action principles, the lower court's ruling creates inordinate practical and systemic problems for bankruptcy courts and litigants by undermining the finality and enforceability of bankruptcy court orders and the ability of debtors to successfully reorganize. In addition, by revisiting the sufficiency of the court-approved notice two decades after the sufficiency of the notice procedures was affirmed in a final, non-appealable order, the Court of Appeals ignored the central teaching of *Bailey* that a final judgment approving a plan of reorganization is immune from collateral attack.

### A. Johns-Manville

This case concerns the first asbestos-related channeling order issued by a federal bankruptcy court, in the reorganization of Johns-Manville Corporation. Manville was a Fortune 200 company beset by a rapidly growing number of asbestos-related lawsuits when it sought bankruptcy protection in 1982. Its Chapter 11 filing commenced what is said to be the "most complex bankruptcy reorganization in history." *In re Johns-Manville Corp.*, 78 B.R. 407, 408 (S.D.N.Y. 1987) (App. 296a). Indeed, Johns-Manville was ranked 181st on the Fortune 500 list at the time of its bankruptcy filing with 1981 revenues of more than $2.2 billion, making it the largest company in the history of the United States to

seek such protection. The bankruptcy stands as one of the most well-known bankruptcies in history.

Manville's most valuable asset was its insurance coverage, including in particular more than 425 policies issued by Travelers, Manville's primary insurer for decades. However, the details of Travelers' coverage obligations and amounts were disputed. Under the Manville plan of reorganization, Travelers agreed to settle the dispute with its payments, "buying back" the insurance policies it had issued to Manville in exchange for an injunction protecting Travelers from any claims "based upon, arising out of or relating to" Travelers' insurance relationship with Manville. (App. 390a–91a). The sums that Travelers paid were deposited into the Manville Personal Injury Settlement Trust for the benefit of current and future asbestos claimants, and all asbestos-related claims—past, present and future—were then "channeled" to the corpus of the trust created by the plan of reorganization and whose administration remained within the jurisdiction of the Bankruptcy Court.

Citing its broad equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a), and to "enjoin suits that might impede the reorganization process," *MacArthur*, 837 F.2d at 93 (2d Cir. 1988) (App. 289a), the Bankruptcy Court enjoined "any Person" from commencing "any and all claims" "based upon, arising out of or relating to" the insurance policies that Travelers issued to Manville. (App. 390a–91a).

The Manville confirmation hearing was preceded by a broad and extensive notice program, which was approved by the Bankruptcy Court upon findings of fact that the notice was adequate as to all interested parties. (App. 547a). Specifically, pursuant to an August 2, 1984 order, notice was published in nearly 100 newspapers throughout the country, as well as to all parties and their counsel in a massive insurance coverage litigation involving Johns-Manville and other parties. (App. 569a). The court-approved notice clearly explained that Manville had reached a settlement with Travelers (defined with other insurers in the notice as the "Settling Carriers") under which the Bankruptcy Court would be asked to issue broad injunctive relief:

> An order of the Bankruptcy Court shall be obtained providing that ***all persons*** shall be restrained and enjoined from commencing [any suit] of any type or nature for any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any person against any and all of the Settling Carriers ***based upon***, ***arising out of*** or ***relating to*** any or all of the insurance policies
>
> . . . .

(App. 564a) (emphasis added).

This language is virtually identical to the relevant provisions of the Bankruptcy Court's 1986 order, *see* (App. 390a–91a); *In re Johns-Manville Corp.*, 2004 WL 1876046, at *15-16 (Bankr. S.D.N.Y. 2004) (App. 224a–25a), and it is the

same language that this Court found to be clear on its face in *Bailey*, *see* 129 S. Ct. at 2203 (App. 65a). The Bankruptcy Court understood at the time that such extensive notice was appropriate given the scope of the relief sought: "[Broad] notice is warranted because of the 'channeling' mechanism and injunctive relief required by the proposed Insurance Settlement Agreement and the effect thereof on those who might assert an interest in the insurance policies and the Debtors' claims against the Settling Carriers." (App. 557a); *see also* (App. 549a) ("[I]mplementation of and compliance with this order and the notice requirements contained herein shall be deemed good and sufficient notice . . . and no further notice shall be required . . . .").

The Bankruptcy Court's 1986 confirmation order and the insurance settlement order that it incorporates (the "1986 Orders") were affirmed on direct appeal by both the district court and the Court of Appeals. In addition to affirming the injunctions, the Second Circuit held on direct appeal that the procedural safeguards used by Judge Lifland in the Manville bankruptcy ensured that "***all . . . interested parties were provided with notice and a hearing*** before the settlements were approved by the Bankruptcy Court," and that such notice fully and unequivocally "***met the requirements of due process***." *MacArthur*, 837 F.2d at 94 (App. 292a) (emphasis added).[3]

[3] Congress has attempted to address the challenges of asbestos litigation on many occasions over the last several decades, but the only statute enacted into law is Section 524(g) of the Bankruptcy Code, which was enacted as part of the Bankruptcy Reform Act of 1994 and replicates the

## B. Proceedings Below

In 2002, after being named in a series of lawsuits (the so-called "direct actions") claiming that Petitioners "conspired" with Manville to conceal the dangers of asbestos, Petitioners sought enforcement of the injunctions contained in the 1986 Orders. After a full, contested evidentiary hearing, the Bankruptcy Court concluded that all of the pending direct action suits against Petitioners violated the 1986 Orders. *In re Johns-Manville*, 2004 WL 1876046, at *30–34 (App. 258a–68a). In addition, the Bankruptcy Court found that the Court's prior injunctions applied equally to contribution claims asserted by other insurers such as Chubb. *See id.* at *34 (App. 268a) (finding that the Bankruptcy Court's 1986 "Orders apply to all Persons without regard to whether the Person asserting the claim is an individual plaintiff attempting to hold Travelers liable for Manville-related conduct or another insurance company attempting to do the same under the guise of claims for contribution or indemnity—both of which qualify as claims . . . which have been, or could have been, or might be, asserted by any Person . . . against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies." (internal quotations omitted)).

On appeal, the District Court affirmed, rejecting Chubb's (and other objectors') various challenges, including its contention that Chubb

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trust/channeling order used by the bankruptcy court in Manville. A companion provision, Section 524(h), codifies the pre-existing Manville confirmation order. *See generally*, RAND Report, at 5–8.

received constitutionally insufficient notice. The District Court correctly and succinctly analyzed Chubb's notice arguments, rejecting them on the basis that (1) Chubb had received actual notice of the 1986 Orders, (2) such actual notice was not required in any event, given the broad publication notice that was previously approved by the Bankruptcy Court and upheld by the original Second Circuit panel on direct appeal, *MacArthur*, 837 F.2d at 94 (App. 292a), and (3) the fact that where, as here, a special remedial scheme exists as in bankruptcy, non-parties such as Chubb may be bound by a prior judgment consistent with due process. *In re Johns-Manville Corp.*, 340 B.R. 49, 68–69 (S.D.N.Y 2006) (App. 163a–65a).

In 2008, the Second Circuit sustained a collateral attack on the Manville injunction in an opinion that was subsequently reversed by this Court in *Bailey*. In its 2008 opinion, the Second Circuit held that the Bankruptcy Court *in 1986* was "without power to enjoin all claims that literally 'arise out of' the insurance policies that Manville purchased from Travelers." *In re Johns-Manville Corp.*, 517 F.3d 52, 67 n.24 (2d Cir. 2008) (App. 122a n.24) ("*Manville I*"). Consequently, the panel did not address Chubb's notice objection or certain other contentions of the parties.

This Court granted certiorari and reversed. *Bailey*, 129 S. Ct. 2195 (App. 54a). Agreeing with the panel that the 1986 Orders "unambiguously apply" to direct actions, *id.* at 2203–04 (App. 69a), this Court rejected the panel's attempt to "prune" the Orders to reach a contrary result, *id.* at 2206 (App. 74a). The Court expressly held that

because "the 1986 Orders became final on direct review over two decades ago . . . whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 ***was not properly before the Court of Appeals in 2008***." *Id.* at 2203 (App. 65a) (emphasis added). Thus, this Court concluded that the injunction against direct actions should be enforced as written against all parties and those in privity with them, regardless of the Bankruptcy Court's subject matter jurisdiction to enjoin such claims. *Id.* at 2205 (App. at 70a). The Court remanded for the Court of Appeals to address the limited question of whether the injunction could be enforced against Chubb, which argued (incredibly given its status as a large insurer and the fact that the Manville bankruptcy was one of the most high-profile bankruptcies in American history) that it did not receive constitutionally adequate notice of the 1986 Orders.

On remand, the two remaining members of the panel[4] issued a 64-page *per curiam* slip opinion that ***reinstated*** its prior ruling that the Bankruptcy Court lacked subject matter jurisdiction when it confirmed the plan of reorganization in 1986. *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010) ("*Manville II*") (App. 1a). Notwithstanding this Court's holding that the subject matter jurisdiction of the Bankruptcy Court in 1986 was not properly before the Court

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[4] Justice (then Judge) Sotomayor was a member of the panel that issued the original Court of Appeals decision in 2008. Upon remand and Justice Sotomayor's subsequent elevation to this Court, the remaining two members of the original panel issued the decision below.

of Appeals except on direct appeal and should not be revisited decades later in a collateral attack, the Court of Appeals came to the *ipse dixit* that if "the 1986 Orders could not bind Chubb because such a holding would violate due process, then Chubb may challenge the bankruptcy court's jurisdiction." *Id.* at 149 (App. 29a). In a direct rebuke to this Court, the panel then announced, "we adhere to our holding . . . that the bankruptcy court exceeded its jurisdiction in 1986." *Id.* (App. 30a).

The panel disregarded the prior final judgment of a sister panel of the Second Circuit on direct appeal in 1988 that the Manville notice fully complied with due process and went on to hold as a matter of law—and contrary to the record—that Chubb did not receive constitutionally adequate notice of the 1986 Orders.

In doing so, the lower court created an unprecedented, and entirely unworkable, bankruptcy notice standard, sweeping aside both the well-established principle that in the bankruptcy context, where "'a special remedial scheme . . . expressly foreclos[es] successive litigation by nonlitigants,'"[5] nonparties such as potential future and contingent claimants may be bound *in personam*, along with the equally established principle that publication notice in such circumstances satisfies due process concerns so long as reasonable notice was provided, under all the circumstances, to apprise interested parties of the pendency of the action with due regard for

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[5] *Ortiz v. Fibreboard Corp.*, 527 U.S. at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)).

the practicalities and peculiarities of the case. *See, e.g.*, *Mullane*, 339 U.S. at 313–19. The panel concluded that these principles simply did not apply because the Bankruptcy Court, in the panel's opinion, exercised more than *in rem* jurisdiction. *Manville II*, 600 F.3d at 154 (App. 42a). The panel went on to hold that "the better due process analogy" by which to assess notice was to look to cases involving class action settlements such as *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *Manville II*, 600 F.3d at 154–55 (App. 43a). Then, purporting to apply *Amchem*, *Ortiz* and the Second Circuit's decision in another class action case, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part by an equally divided court*, 539 U.S. 111 (2003), the panel concluded that it would have been impossible to provide Chubb with constitutionally adequate notice because Chubb did not have "the sort of prescience" to have known that the 1986 Orders would have barred contribution claims against Travelers or that the Bankruptcy Court would have purportedly exceeded its subject matter jurisdiction. *Manville II*, 600 F.3d at 157–58 (App. 43a–50a). The panel observed that in adopting its class action notice standard in the bankruptcy context, its ruling was unprecedented. *Id.* at 154 (App. 43a) (acknowledging the court was writing "in legal territory that is undoubtedly *sui generis* as to the due process question before [the court]").

On April 5, 2010, Petitioners moved for rehearing or, in the alternative, rehearing *en banc*, which was denied on May 25, 2010. (App. 582a).

## REASONS FOR GRANTING THE PETITION

When this Court remands a case to the court of appeals, the lower court is "bound by the decree as the law of the case." *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427–28 (1978) (internal quotations omitted); *see also United States v. Haley*, 371 U.S. 18, 20 (1962) (a lower court may not "reinstat[e] its own original judgment" on an issue that the Supreme Court decree resolves); *Gaines v. Caldwell*, 148 U.S. 228 (1893) (where the appellate court leaves certain issues open for the lower court's consideration, the lower court must confine itself to those issues). The Second Circuit failed to honor the mandate of this Court either in substance or in spirit.

Of nearly equal significance is the fact that "the very functioning of the bankruptcy system is dependent on its finality." *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007). The Second Circuit's errors—and the consequences of those errors—are even more significant than when this Court first granted certiorari in this case. If left uncorrected, the decision below would once again undermine the finality of bankruptcy court orders. Once again, if the decision below is left to stand, it would drastically reduce the incentive for insurers to contribute funds to 524(g) trusts for distribution to asbestos victims, as practitioners and commentators were quick to point out in criticizing the Second Circuit's initial decision in this appeal. *See, e.g.*, Dan Schechter, *Despite § 524(g), Global Settlement in Asbestosis Case Cannot Deprive Third-Party Plaintiffs of Direct Actions Against Nondebtor Insurer*, 2008 Comm. Fin. News. 18 (Feb. 25,

2008) ("If this opinion stands . . . , quite a few supposedly 'global' asbestos settlements will be imperiled. Some insurers will decline to participate in Manville settlements."). Moreover, the ruling would create substantial difficulties and confusion as to the due process standards applicable to notice in the bankruptcy context. Indeed, the ruling below calls into question whether notice could ever be considered constitutionally adequate to bind future parties in the bankruptcy context, even after final judgment, and as a result would create enormous practical problems for bankruptcy courts, debtors and other interested parties. These problems would be particularly acute in the asbestos context, where dozens of debtors have successfully reorganized and tens of billions of dollars have been contributed to trusts based largely on the model used in this case. *See generally*, RAND Report, at 5–8.

## I. THE DECISION BELOW EXCEEDS THE SCOPE OF THIS COURT'S MANDATE IN *BAILEY*

This Court in *Bailey* unequivocally held that "it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986." *Bailey*, 129 S. Ct. at 2205 (App. 70a); *see also id.* at 2203 (App. 66a) ("[W]hether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008."); *id.* at 2206 (App. 74a) (criticizing the panel's effort to reexamine the court's subject matter jurisdiction almost a quarter century after the *MacArthur* decision became a final order). The Court further

explained that there are only "rare situations in which subject-matter jurisdiction is subject to collateral attack" and that none of those exceptions applies here. *Id.* at 2206 n.6 (App. 72a n.6). Nonetheless, on remand, the Court of Appeals did precisely what it was admonished it could ***not*** do, and "adhere[d] to [its] holding . . . that the bankruptcy court exceeded its jurisdiction in 1986." *Manville II*, 600 F.3d at 149 (App. 30a).

The Court of Appeals' express disregard and contravention of this Court's mandate in *Bailey* warrant certiorari. *See* Eugene Gressman, Kenneth S. Gellar, et al., *Supreme Court Practice* 655 (9th ed. 2007) ("If the action of the lower court [in contravention of this Court's mandate] takes the form of an appealable order, the aggrieved parties may file the ordinary petition for certiorari."); *see also In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Baltimore & Ohio R.R. v. United States*, 279 U.S. 781, 785 (1929).

This Court's ruling in *Bailey* left no room for doubt as to whether the Bankruptcy Court's subject matter jurisdiction in 1986 could be collaterally attacked, decades after the orders under review have become final orders. After this Court instructed the Court of Appeals that it may not second-guess the Bankruptcy Court's subject matter jurisdiction to enter the orders it did in 1986, the Court remanded to the Court of Appeals to consider Chubb's remaining argument that it lacked "constitutionally sufficient notice of the 1986 Orders [such] that due process absolves it from following them, whatever their scope." *Bailey*, 129 S. Ct. at 2207 (App. 75a). The core holding of *Bailey* is that the Court of

Appeals is precluded from revisiting orders incorporated in final judgments. This is a bedrock rule of law that this Court has reaffirmed on numerous occasions and which is a foundation of our system of jurisprudence. *See, e.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940) (refusing to permit a collateral attack on a bankruptcy court's judgment where the parties involved in the original proceeding had an opportunity to challenge the court's jurisdiction, even though no such challenge was actually litigated); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) (same).

If it was error for the Court of Appeals to engage in a collateral attack of the Bankruptcy Court's subject matter jurisdiction prior to this Court's ruling in *Bailey*, it was equally erroneous for it to have done so on remand. The panel's reaffirmation of its prior holding that the Bankruptcy Court lacked subject matter jurisdiction, under the guise of resolving Chubb's notice objection, is both substantively incorrect and an improper disregard of the supremacy of this Court.

Indeed, disregard for this Court's mandate pervades the entire decision below. Illustrative of the Court of Appeals' disregard are its complete dismissal of this Court's express holding that the language of the 1986 Orders plainly barred and always had barred direct actions, *see Bailey*, 129 S. Ct. at 2203–04 (App. 65a-67a), and this Court's explicit rejection of Chubb's argument "that this is just revisionism perpetrated by the [2004] Clarifying Order," 129 S. Ct. at 2204 (App. 67a). On remand, the Court of Appeals nonetheless

reaffirmed its original conclusion that the injunction against direct actions resulted from the Bankruptcy Court's interpretation of the 1986 Orders in 2004 (when Petitioners sought enforcement of the earlier final orders), rather than as a result of the Orders themselves.[6] Likewise, as discussed further in Petitioners' petition for a writ of mandamus, the panel reasoned that notice was not adequate because Chubb might have believed the injunction would not bar Chubb's potential contribution claims based on statements made in a private letter, written more than a year before the 1986 Orders were entered. *See Manville II*, 600 F.3d at 158 (App. 50a-51a). The panel below blatantly ignored the fact that this Court *explicitly rejected* this argument in *Bailey* and held that "where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Bailey*, 129 S. Ct. at 2204 (App. 69a).

Moreover, as discussed further below, the Court of Appeals' decision to allow a collateral attack on the court-approved notice—despite the Second Circuit's holding on direct appeal that the notice was adequate to put interested parties on notice consistent with due process—flies in the face of the very premise of *Bailey* that it is inap-

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[6] *E.g.*, *Manville II*, 600 F.3d at 153 (App. 40a) ("[O]ur due process analysis must take into account the *in personam* manner in which the 1986 Orders were interpreted by the bankruptcy court in 2004."); *id.* at 154 (App. 41a-43a) (similar). From this premise, the Court concluded that Chubb could not be bound by the 1986 Orders because it reasonably would have lacked the "sort of prescience" necessary to anticipate how the 1986 orders would be interpreted in 2004. *Id.* at 157 (App. 49a–50a).

propriate to permit collateral attacks on an order that long ago became final.

In short, the decision of the two-judge panel on remand amounts to a direct assault on this Court's ruling in *Bailey* and a refusal to abide by the Court's mandate. It clearly and indisputably violated this Court's mandate by again erroneously ruling that the Bankruptcy Court lacked subject matter jurisdiction in 1986, by embracing reasoning that this Court directly rejected in *Bailey*, and by once again allowing a collateral attack on an order for an alleged due process violation that was rejected on direct appeal over two decades ago.

## II. THE SECOND CIRCUIT'S HOLDING THAT CHUBB LACKED CONSTITUTIONALLY ADEQUATE NOTICE BOTH (1) CONSTITUTED AN IMPERMISSIBLE COLLATERAL ATTACK ON A FINAL ORDER AND (2) CONFLICTS WITH SIXTY YEARS OF SUPREME COURT AND LOWER COURT PRECEDENT SINCE *MULLANE*

More than twenty years ago, the Bankruptcy Court, the District Court, and the Court of Appeals each held that the extensive publication notice approved by the Bankruptcy Court here complied with due process. *In re Johns-Manville Corp.*, 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986) ("[T]he Debtor undertook an extensive campaign designed to provide the maximum amount of publicity, with respect to the confirmation process of this Plan, that was reasonable to expect of man and media."), *aff'd* 78 B.R. 407 (S.D.N.Y. 1987);

*MacArthur*, 837 F.2d at 94 (App. 292a) ("The notice of proposed settlements issued by the Bankruptcy Court met the requirements of due process."). The Court of Appeals' contrary ruling in 2010 on an issue necessarily central to Manville's reorganization—and, indeed, to any reorganization in which future or contingent claimants' rights are necessarily affected—is worthy of this Court's review given the manner in which this ruling undermines important principles of finality. Indeed, the notion that a final judgment holding notice was constitutionally adequate can be collaterally attacked directly contravenes this Court's rulings in *Bailey* and *Espinosa*, which reaffirm that such a collateral attack on a long-final order is fundamentally at odds with our system of jurisprudence. *See Bailey*, 129 S. Ct. at 2206 (App. 73a) (noting that "'[i]t is just as important that there should be a place to end as that there should be a place to begin litigation'") (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938))).

For at least sixty years, this Court has made clear that reasonable publication notice is constitutionally adequate to bind "unknown" persons—that is, persons whose interests are "conjectural or future" or unknown in the "due course of business"—irrespective of whether the judgment is *in personam* or *in rem*. *See Mullane*, 339 U.S. at 317–18; *see also Chemetron Corp. v. Jones*, 72 F. 3d 341, 346 n.1 (3d Cir. 1995) (explaining that *Mullane* sets the standard for notice required in Chapter 11 cases). This principle is nowhere more important than in proceedings under the Bankruptcy Code, as "the

very functioning of the bankruptcy system is dependent on its finality." *Bosiger*, 510 F.3d at 450; *see also Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (recognizing the Bankruptcy Code's central purpose of providing the "'honest but unfortunate debtor'" with a "fresh start" (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934))). As one circuit court observed, "[d]ebtors cannot be required to provide actual notice to anyone who potentially could have been affected by their actions; such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." *Chemetron*, 72 F.3d at 348. Indeed, this Court recently reaffirmed these principles in *Espinosa*, in which the Court unanimously reaffirmed that "[d]ue process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 130 S. Ct. at 1378 (quoting *Mullane*, 339 U.S. at 314).

Because Chubb's interests were contingent and conjectural at the time of the Manville confirmation, publication notice was sufficient under *Mullane* and its progeny to provide it with constructive notice so long as the notice was reasonably calculated under the circumstances to put interested parties such as Chubb on notice of the pendency of the action and an opportunity to be heard.[7] The Second Circuit directly addressed

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[7] The District Court below also found that, in any event, Chubb had actual notice of the Manville bankruptcy proceedings. 340 B.R. at 68 (App. 163a). Given the sophistication of Chubb as an insurer of asbestos-related opera-

that issue on direct appeal two decades ago, and held that the publication notice and the extensive procedures adopted by Judge Lifland fully satisfied due process. *MacArthur*, 837 F.2d at 94 (App. 292a). Given that Chubb has not, to date, asserted any contribution claims against Petitioners, it is in the same position today as it was at the time of the original publication notice prior to the 1986 Orders. Notice was sufficient to bind Chubb then, and it is today. The Second Circuit on remand in 2010 should not have departed from its prior holding, in what amounted to another collateral attack on the long-final Manville plan of reorganization. Indeed, this was the teaching of this Court's decisions in *Bailey* and *Espinosa*, as well as the many other decisions of this Court precluding collateral attacks on a final judgment. *See, e.g.*, *Chicot County Drainage*, 308 U.S. at 375 (refusing to permit a collateral attack on a bankruptcy court's judgment where the parties involved in the original proceeding had an opportunity to challenge the court's jurisdiction, even though no such challenge was actually litigated); *Stoll*, 305 U.S. 172 (same).

Moreover, irrespective of whether the court should have entertained a collateral attack on

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tions (findings the panel did not question, *see* 600 F.3d at 145, 157 (App. 21a, 50a)), and the fact that the Manville bankruptcy was among this country's most well-known bankruptcies in history, it strains credulity to suggest that Chubb would not have had notice of the Bankruptcy Court's proceedings. The Court of Appeals cited no evidence in the record—and there was none—to support the proposition that Chubb did not have actual notice (in addition to constructive notice) contrary to the District Court's findings.

the Bankruptcy Court's notice contrary to the Second Circuit's earlier ruling on direct appeal, the Court of Appeals erred by refusing to recognize that publication notice was sufficient to bind Chubb—creating an unprecedented, and wholly impractical, bankruptcy notice standard. For decades, the courts of appeals have relied on sufficiency of publication notice as to unknown or future claimants in accordance with *Mullane* and its progeny to uphold the finality of bankruptcy court orders and advance the Bankruptcy Code's core "fresh start" and reorganization policies. *See, e.g., In re Trans World Airlines, Inc.*, 96 F.3d 687, 689 (3d Cir. 1996) (creditors precluded from asserting prepetition claims because they were "unknown creditors entitled solely to publication notice"); *Chemetron*, 72 F.3d at 345–46 (creditors who resided or visited nuclear waste sites were "unknown" creditors for whom publication notice sufficed); *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 789 (7th Cir. 1992) (debtor's knowledge of railroad derailment was insufficient to make state agency's CERCLA claim known and thus publication notice was sufficient to bind agency); *In re GAC Corp.*, 681 F.2d 1295, 1300 (11th Cir. 1982) (publication notice sufficient to bind prior owners of debentures who held only speculative claims against debtor); *see also In re Union Hosp. Ass'n of Bronx*, 226 B.R. 134, 138–40 (Bankr. S.D.N.Y. 1998) (publication notice sufficient to bind holders of potential contribution and indemnification claims). Chubb's status as a conjectural future claimant is the classic situation in which publication notice is permitted to satisfy any due process concerns, consistent with the Second Circuit's ruling on

direct appeal. *See also Chemetron*, 72 F.3d at 347-48 (holding that publication notice was sufficient for potential failure tort claimants).

In addition, it is well-settled that nonparties may be bound *in personam* by a judgment where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as in bankruptcy. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2173 (2008); *Ortiz*, 527 U.S. at 846; *Martin*, 490 U.S. at 762 n.2 (1989). The lower court disregarded this principle and *Mullane* by erroneously concluding, without support, that these principles have no bearing where a bankruptcy court purportedly exercises more than *in rem* jurisdiction. There was no basis for such a distinction between *in rem* and *in personam* proceedings. This Court long ago discredited the notion that the adequacy of notice varies with the *in rem* or *in personam* label placed on a court's exercise of jurisdiction. *See Mullane*, 339 U.S. at 312; *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977). "The decision in *Mullane* rejected one of the premises underlying this Court's previous decisions concerning the requirements of notice in judicial proceedings: ***that due process rights may vary depending on whether actions are* in rem or in personam.**" *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 796 n.3 (1983) (emphasis added). As the last sixty years of due process jurisprudence make clear, it is constitutionally irrelevant whether the aspect of the 1986 Orders now being enforced reflects an exercise of *in rem* or *in personam* jurisdiction. Such a distinction is "elusive and confused generally" and cannot be the basis for determining the constitutional adequacy of notice. *Shaffer*, 433 U.S. at 206.

Further, the Court of Appeals' reasoning that the notice was inadequate is both wrong and flatly inconsistent not only with the Second Circuit's prior ruling on direct appeal, but also with this Court's ruling in *Bailey*. The panel concluded that even if Chubb had received notice, it would not have had "the sort of prescience" to have known that the 1986 Orders would have barred contribution claims against Travelers or that the Bankruptcy Court would have purportedly exceeded its subject matter jurisdiction. *Manville II*, 600 F.3d at 157–58 (App. 49a-50a). Putting aside the fact that the Bankruptcy Court did *not* exceed its subject matter jurisdiction,[8]

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[8] This Court has recognized that bankruptcy court jurisdiction is not limited to the res of a debtor's estate. "The Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res," including the power to "issue ancillary orders enforcing [bankruptcy courts'] *in rem* adjudications." *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006) (quoting U.S. Const. art. I, § 8, cl. 4). Indeed, bankruptcy courts have long issued orders that necessarily reach beyond the debtor's res. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bankr. S.D.N.Y 1991) (affirming a settlement agreement pursuant to which all future claims against a debtor's officers and directors were enjoined), *aff'd*, 960 F.2d 285, 293 (2d Cir. 1992); *In re A.H. Robins Co.*, 880 F.2d 694, 701–02 (4th Cir. 1989) (affirming bankruptcy court confirmation order that barred claims against a debtor's directors, attorneys and insurers); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (affirming confirmation order that barred claims against debtor's insurers, in connection with creation of $2.35 billion fund for compensation of personal injury claims); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656–57 (7th Cir. 2008) (allowing, in certain circum-

the published notice included virtually the very language of the injunction ultimately entered by the bankruptcy court, *Manville II*, 600 F.3d at 139 n.3 (App. 8a n.3), which this Court held ***unambiguously*** bars direct actions against Travelers and always has. *Bailey*, 129 S. Ct. at 2203–04 (App. 69a). Indeed, other interested parties (other than Chubb) immediately recognized this prior to entry of the 1986 Orders and asserted objections on this basis, *see Manville II*, 600 F.3d at 140–41 (App. 11a), as Chubb (or any other insurer) could have done as well at the time. In its prior opinion in 2008, the Second Circuit agreed that there was no difference, for purposes of the 1986 Orders, between direct actions and contribution claims, nor has Chubb ever disputed that contribution claims were within the literal terms of the 1986 Orders. *See Manville I*, 517 F.3d at 60 n.17 (App. 105a n.17) ("[T]he indemnity or contribution rights of Chubb and other insurers against Travelers do not significantly differ from the statutory and common law claims discussed herein."); *see also In re Johns-Manville Corp.*, 340 B.R. at 61 (App. 147a) ("Similarly, the contribution and indemnity claims of the Objecting Insurers were barred by the same broad provisions of the 1986 Orders . . . . [which] also provided protection from other insurance companies who sought to hold Travelers liable indirectly for the damages that it could not be held directly liable to the individual claimants."). Thus, the notice clearly put all interested parties on notice that direct action claims, and related contribution claims by other insurers, were being

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stances, "a bankruptcy court [to] release a non-debtor from creditor liability").

enjoined under the plain language of the Bankruptcy Court's order.

As the Court of Appeals correctly concluded in 1988 on direct appeal, the notice was reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. Under these circumstances, due process was fully satisfied. Chubb could have appeared at the confirmation hearings in 1986 as other parties did, and taken direct appeals as of right. Chubb's failure to object at the time could not be excused on the basis that it supposedly believed the Bankruptcy Court's orders were unlawful or that they would not be applied as written, and the Court of Appeals' invalidation of the notice as constitutionally deficient was fundamentally flawed. *See Espinosa*, 130 S. Ct. at 1380.[9]

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[9] In effect, the decision below holds that notice of the unambiguous terms of a proposed court order is constitutionally inadequate to bind any contingent claimant who fails to grasp how the court order might affect its particular interests. However, contrary to the ruling below, due process does not require that a debtor educate claimants—known or unknown—on the particular nature of their claims. *See, e.g., In re Penn Cent. Transp. Co.*, 771 F.2d 762, 768 (3d Cir. 1985); *cf. In re Varat Enters.*, 81 F.3d 1310, 1316 (4th Cir. 1996) ("For purposes of *res judicata*, it is not necessary to ask if the [claimant] knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not party awareness of it, that controls." (internal quotations omitted)). Nor does it require a debtor to possess (and to communicate) greater "prescience" about the nature of future and contingent claims than unknown claimants themselves possess. *See, e.g., In re Chicago Milwaukee*, 974 F.2d 775 (state agency's

The lower court compounded these errors by improperly injecting class action principles into the bankruptcy context without regard for the important distinctions between bankruptcy proceedings and Rule 23(b)(3) class actions. This Court has long distinguished class action litigation from court proceedings conducted pursuant to the Bankruptcy Code, recognizing that each presents its own distinct exception to the general rule that a nonparty may not be bound *in personam* by a court order. *E.g.*, *Taylor*, 128 S. Ct. 2161; *Ortiz*, 527 U.S. at 846. Thus, as discussed above, the Court has repeatedly recognized an exception where, as in bankruptcy, "a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants." *Ortiz*, 527 U.S. at 846 (quoting *Martin*, 490 U.S. at 762 n.2).

Under this Court's decisions, the requirements of due process in an individual case must be evaluated in light of the particular governmental interests at stake. *Mullane*, 339 U.S. at 313–14 (balancing the state's interest in finality against the individual interest in notice); *cf. In re Chicago Milwaukee*, 974 F.2d at 788 (in bankruptcy proceedings, adequacy of notice must be evaluated against "the interest in the fair and equitable distribution of limited resources and

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CERCLA claim, which was unknown to debtor, was barred); *cf. Brody v. Vill. of Port Chester*, 434 F.3d 121, 130 (2d Cir. 2005) (because the "general facts and circumstances test of *Mullane*" governs what information must be conveyed, the notice must include only "as much" information "as is practicable"). Due process simply requires notice reasonably sufficient to "acquaint[ ] interested parties of the fact that their rights are before the courts," *Mullane*, 339 U.S. at 315.

the interest in giving a debtor a fresh start," both of which are "better served if a bankruptcy court has all claims before it"). In the bankruptcy context, bankruptcy confirmation orders necessarily involve the adjustment of relations with past, present and potentially future creditors. By contrast, class actions involve adjudication of claims on behalf of a discrete group of claimants arising from a defendant's past tortious or otherwise unlawful conduct. The differences between class actions and bankruptcy proceedings in terms of their purposes, governmental and private interests, and practicalities involved, preclude the wholesale adoption of class action notice requirements into the bankruptcy context. The Second Circuit's wholesale application of Rule 23(b)(3) standards—which are predicated on the litigant's procedural right to opt-out and thus present none of the heightened interests in finality and repose present in bankruptcy—cannot be squared with the purposes and interests at stake in bankruptcy proceedings, which require finality. *Cf. Bosiger*, 510 F.3d at 450 ("[T]he very functioning of the bankruptcy system is dependent on its finality.").

By adopting an unworkable and inapplicable class action notice standard, the Second Circuit's decision creates a conflict with the decisions of this Court such as *Mullane* and those of other courts of appeal that have long relied on those rulings. *Cf. Bosiger*, 510 F.3d at 451 ("Courts have interpreted the *Mullane* standard flexibly in the bankruptcy context, measuring the adequacy of notice against the certainty of a creditor's claims. If a creditor possesses either a conjectural or future interest that do[es] not in due

course of business come to [the] knowledge of the debtor, courts have held that notice by publication is sufficient . . . .") (citations omitted).[10]

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Together, the Court of Appeals' errors impose unduly onerous, impractical and constitutionally unnecessary notice requirements on bankruptcy proceedings that conflict with this Court's due process jurisprudence and undermine the goals of bankruptcy. The decision would create enormous uncertainty about what form of notice, if any, could suffice to bind claimants to bankruptcy court orders. Moreover, because it requires a degree of particularized notice for contingent claimants that would be impracticable in any complex bankruptcy, the decision below would unsettle existing orders that discharge contingent claims and frustrate the discharge of such claims in any future bankruptcy.

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[10] *See also In re Arch Wireless, Inc.*, 534 F.3d 76, 80 (1st Cir. 2008) ("For notice purposes, bankruptcy law distinguishes between 'known creditors,' who are entitled to receive direct notice of each stage in the reorganization proceedings, and 'unknown creditors,' for whom publication notice is sufficient. . . . An 'unknown creditor' is one whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].") (citations omitted); *In re Mansaray-Ruffin*, 530 F.3d 230, 239 n.7 (3d Cir. 2008) ("[I]t is well established that notice of bankruptcy proceedings by publication is generally sufficient to protect the procedural due process rights of unknown creditors."); *Chemetron*, 72 F.3d at 346–47 (notification by publication will generally suffice under *Mullane*).

The decision below would also call into question the enforceability of channeling injunctions entered in asbestos cases throughout the country. Literally tens of billions of dollars have been committed to asbestos trusts in such cases based on the premise that the channeling mechanism originally used by Judge Lifland in the Manville bankruptcy would provide all parties with finality, and that once entered and affirmed, the finality of those orders would be respected as to *all* interested parties who received reasonable notice of the orders. *See* RAND Report, at 5–8.[11]

Indeed, the decision below calls into question the constitutionality of *any* remedial scheme that precludes successive litigation by unknown claimants given reasonable publication notice, especially where such schemes bar *in personam* or contingent claims. *See, e.g.*, Federal Deposit Insurance Act, 64 Stat. 873 (1950) (codified as amended at 12 U.S.C. §§ 1811–32) (providing for the administration and liquidation of insolvent banks); 12 U.S.C. § 1821(d)(13)(D) ("claims" subject to the statutory bar under the Federal Deposit Insurance Act includes "claim[s] relating

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[11] Congress codified the pre-existing Manville confirmation order in 11 U.S.C. Section 524(h). In the committee report accompanying the legislation, Congress noted that the Manville confirmation order was "a creative solution to help protect the future asbestos claimants," H.R. Rep. 103-835, at 40, and notes that the purpose of the statute is "to strengthen the Manville . . . trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards [as in Manville] with respect to regard for the rights of claimants, present and future." *Id.* at 41. *See also* RAND Report, at 5-8.

to any act or omission of [the institution under receivership] or the [FDIC] as receiver"); *see also Acevedo v. First Union Nat'l Bank*, 476 F.3d 861, 866 (11th Cir. 2007) (statutory bar precluded claims against bank in receivership under the Federal Deposit Insurance Act "[b]ecause is it undisputed that the FDIC could not readily ascertain the identities and addresses of the named payees or subsequent holders of the checks" and therefore "the FDIC's published notices were sufficient to comport with due process requirements"); *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1036 (4th Cir. 1994) (claims against insolvent bank were statutorily barred under the Federal Deposit Insurance Act because the bar date was published in local newspapers).

## CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted. In the event the Court denies this petition, the Court should grant Travelers' Petition for a Writ of Mandamus filed herewith, and issue a writ of mandamus requiring the Court of Appeals to comply with the Court's mandate in *Bailey*.

Respectfully submitted,

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